EXPECTATION
FOR CIVILITY & PROFESSIONALISM
in
Justice Courts

Utah Misdemeanor Prosecutors Association Conference, Moab, Utah
August 6, 2015

1. "That Justice Shall be Done"

State v. Doyle, 245 P.3d 206, Utah App.,2010

¶ 12 For all lawyers, and **especially for prosecutors**, "conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms ... [and] we must be mindful of our obligations to the administration of justice, which is a truth-seeking process." Utah Standards of Professionalism & Civility 14–301.

Recently we highlighted, and it bears repeating, the United States Supreme Court's caution to prosecutors that their " 'role transcends that of an adversary: **[a prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done**.' " *State v. Hamblin*, 2010 UT App 239, ¶ 18 n. 5, 239 P.3d 300 (omissions in original) (quoting *United States v. Bagley*, 473 U.S. 667, 675 n. 6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

Moreover, prudence dictates that all parties—**especially prosecutors and others in the business of justice—ought to err on the side of disclosure**. Clearly, the better practice for the State is to disclose in a timely fashion any evidence conceivably required to be disclosed under *Brady* rather than to find itself in the awkward position of having to rationalize and defend nondisclosure on appeal.

Id. ¶ 18 (footnote omitted). (Emphasis added)

2. Prosecutorial Misconduct Standard: Nondisclosure of Evidence

***17** While the definition of prosecutorial misconduct may be somewhat unclear, the Utah Supreme Court has found that the non-disclosure of evidence by the prosecution may constitute misconduct. [*State v. Hay*, 859 P.2d 1, 7 (Utah 1993) (although prosecution violated its duty of disclosure, reversal was not required because "the prosecution's misconduct was not prejudicial.")] Nevertheless, "[w]hether the prosecution has committed misconduct depends upon the particular circumstances of each case and **bad faith must be shown to establish** the existence of misconduct." [citation omitted] Certainly any dishonest or deceptive conduct by prosecutors as part of a **deliberate attempt to undermine the truth-seeking function** of the judicial process would fall within its parameters. *State v. Weitzel*, 2001 WL 34048225 (Utah Dist.Ct., Judge Kay)

Additional reading from *Slate*: When Prosecutors Believe the Unbelievable "This story is bizarre, but it's not all that unusual: Prosecutors can prosecute even the weakest, most clearly flawed cases relentlessly, and innocent people can end up in jail."
http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/mark_weiner_conviction_vacated_chelsea_steiniger_text_case_finally_overturned.html?wpsrc=sh_all_dt_tw_top

2. Prosecutorial Misconduct: Closing Remarks to Jury

a. What if you call yourself a "Champion of Justice" ?

State v. Graham, 299 P.3d 644, Utah App.2013

¶ 23 "We will reverse a jury verdict because of prosecutorial misconduct if we find the prosecutor's remarks were improper and harmful to defendant." *State v. Calliham*, 2002 UT 86, ¶ 61, 55 P.3d 573. Remarks are considered improper if they "called to the jurors' attention matters which they would not be justified in considering in reaching a verdict." *State v. Creviston*, 646 P.2d 750, 754 (Utah 1982). Improper remarks are harmful to the defendant if, "under the circumstances, the jurors were probably influenced by the remarks." *Id.* Remarks concerning matters that are peripheral to a defendant's guilt and cannot possibly prejudice a defendant unfairly will not be considered improper or harmful. *See State v. Tillman*, 750 P.2d 546, 556 (Utah 1987).

¶ 24 Although the State briefly discussed the ethical standards associated with being a prosecutor, those remarks were not improper and did not prejudice Defendant. The State did not in any way imply that Defendant or trial counsel operated on a lower ethical plane. In fact, the State did not mention Defendant or his counsel at all during these remarks other than to point out that **Defendant had accused the State of prioritizing wins and losses over truth and justice. By making such an accusation, Defendant opened the door to an appropriate response by the State. And, within the context of Defendant's accusation, the jury no doubt viewed the State's remarks as a defense of its own ethical standards rather than an attack on Defendant's or trial counsel's character or ethical standards**. Under all the circumstances, the verdict was likely not influenced by the remarks, trial counsel was not ineffective for failing to object to them, and the trial court did not plainly err in allowing them.

b. But beware of appealing to the jury's emotions!

State v. Akok, 348 P.3d 377, Utah App. 2015

In this rape case, the prosecutor said the following in closing:

"And when you look at the totality of the evidence it is very clear that [Defendant and the codefendant] engaged in sexual intercourse and touched her without her consent. *They took advantage of a very vulnerable victim. Don't let them take advantage of it again.* Thank you.

After the defendant moved for a mistrial, the judge decided to give a curative instruction. The Court of Appeals found that the curative instruction (basically a re-reading of the stock instructions that indicate the jury must ignore statements of the advocates in closing) didn't cure anything:

¶ 13 "In our judicial system, the prosecution's responsibility is that of a minister of justice and not simply that of an advocate, which includes a duty to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *State v. Todd*, 2007 UT App 349, ¶ 17, 173 P.3d 170 (citation and internal quotation marks omitted). Therefore, "the conduct of the prosecutor at closing argument is [appropriately] circumscribed by the concern for the right of a defendant to a fair and impartial trial." *Id.* (alteration in original) (citation and internal quotation marks omitted). Accordingly, "while prosecutors must have the freedom to present closing argument with logical force, they must also act within the constraints imposed upon their office." *Id.* ¶ 18.
¶ 14 In this case, during the prosecutor's rebuttal, he told the jury:

> And when you look at the totality of the evidence it is very clear that [Defendant and the codefendant] engaged in sexual intercourse and touched her without her consent. They took advantage of a very vulnerable victim. Don't let them take advantage of it again. Thank you.

Defendant argues that this statement was improper because the "prosecutor's remark ... appealed to the jurors' emotions and diverted their attention from their legal duty to determine guilt impartially." We agree. (footnote omitted)

¶ 15 In *State v. Wright*, 2013 UT App 142, 304 P.3d 887, the prosecutor's final statement to the jury during the rebuttal phase of closing arguments was "You have the power to make that [the abuse] stop." *Id.* ¶ 41. We noted that the prosecutor's statement did not rebut any statements made by the defendant; rather, the statement called on the jury "to assume the responsibility of ensuring [the victim's] safety." *Id.* Ultimately, we determined that the prosecutor's statement was improper because it "appeal[ed] to the jurors' emotions by contending **that the jury ha[d] a duty to protect the alleged victim—to become her partisan—which divert[ed] their attention from their legal duty to impartially apply the law to the facts**." *Id.* ¶ 16 Here, the prosecutor's statement during the rebuttal portion of closing arguments—"They took advantage of a very vulnerable victim. Don't let them take advantage of it again."—similarly appealed to the jurors' emotions. The statement suggested to the jurors that they had a duty to protect N.C., or perhaps women generally, from Defendant and the codefendant. And it suggested that an acquittal would allow Defendant and the codefendant to take advantage of N.C. or other women again. In other words, the statement called on the jury to "assume the responsibility of ensuring [N.C.'s] safety." *See id.* As we determined in *Wright*, such statements divert the jury's attention from its legal duty to impartially apply the law to the facts. *See id.* Accordingly, we conclude that the prosecutor's statement was improper and called the jurors' attention to matters they were not justified in considering in reaching their verdict. *See Peters*, 796 P.2d at 712.

[But wait! There's more:]

¶ 17 We now consider the second step of the prosecutorial-misconduct analysis, i.e., whether, under the facts of this case, the error was "substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result" for Defendant. *Id.* (citation and internal quotation marks omitted). In making this assessment, "we are mindful that [a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *State v. Todd*, 2007 UT App 349, ¶ 31, 173 P.3d 170 (alteration in original) (citation and internal quotation marks omitted). Rather, improper comments by the prosecutor require reversal only if they "substantially affected the defendant's right to a fair trial." *Id.* (citation and internal quotation marks omitted). "That threshold is met when the likelihood of a different outcome [is] sufficiently high to undermine [our] confidence in the verdict." *State v. Thompson*, 2014 UT App 14, ¶ 83, 318 P.3d 1221 (alterations in original) (citation and internal quotation marks omitted).

The court noted that the main evidence in the case was N.C.'s statement that she was raped. The judge's curative instruction was "watered down," and did not address the specific improper statement the prosecutor made. [Eventually the case came back to the trial court, the defendant entered a plea to attempted rape, and he was put on probation for 36 months.]

Scenario #1: Dealing with an Unrepresented Person

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3a] Utah has not adopted the ABA version of Rule 3.8. ABA Model Rule 3.8(d), requiring the prosecution to inform the tribunal of mitigating information related to sentencing, creates an unreasonable burden and is not deemed workable where the same information is required to be disclosed to the defense counsel who should be in the best position to decide what to present to the tribunal. The ABA's paragraph (e) regarding limitations on subpoenaing lawyers to grand juries or other legal proceedings is viewed as unnecessary, as there are adequate safeguards in place for federal prosecutors, and the Utah criminal justice system does not typically use the grand jury procedure. Utah has not adopted the ABA's proposed paragraph (f), because the changes are either unnecessary because of, or are potentially inconsistent with, the provisions of Rule 3.6.

Rule 4.3. Dealing with Unrepresented Person.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A lawyer may consider a person, whose representation by counsel in a matter does not encompass all aspects of the matter, to be unrepresented for purposes of this Rule and Rule 4.2, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer' s client and those in which the person' s interests are not in conflict with the client' s. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that this Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer' s client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer' s view of the underlying legal obligations.

[3] Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who undertakes a limited representation must assume the responsibility for informing another party' s lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary' s lawyer to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer to make certain ex parte contacts without violating Rule 4.2.

[3a] Utah Rule of Professional Conduct 4.3(b) and related Comment [3] are Utah additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2.

Also see Rule 35, **Utah Rules of Criminal Procedure: Victims and Witnesses**

Mental health issues: See Rule 1.14

Judicial Canon 2, RULE 2.2 - Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

COMMENT
[1] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[2] When applying and interpreting the law, a judge may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[3] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(a)(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a

witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A

proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Emphasize pars 4-6

Preparation: Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Communication with witnesses: Rule 4.1 Truthfulness in Statements to Others [Especially in DV cases]

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentation by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rules Governing the Utah State Bar

Rule 14-301. Standards of Professionalism and Civility.

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond.

1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers shall avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1; R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Supreme Court Rules of Professional Practice

Rule 11-301. Utah Standards of Judicial Professionalism and Civility.

Preamble

Judges are tasked with the important responsibility of presiding over adversarial judicial proceedings. In such proceedings the rights, responsibilities, liberties, and even lives of the parties may hang in the balance. And in light of these high stakes, conflict and tension are inevitable—to some degree even expected in a system that depends on an element of adversariness in the search for truth and justice.

Even in the adversary process, we expect the parties and their counsel to follow basic principles of civility and professionalism. In Utah, our Standards of Professionalism and Civility represent our attempt to articulate those principles for members of the Utah Bar. The standards below state a parallel set of principles for the judiciary.

Our judges should aspire to a high level of professionalism and civility in the performance of their judicial responsibilities. When judges display unprofessional or uncivil conduct, they undermine the goal of securing equal justice for all under the law. Conversely, when judges model civil and professional behavior, the system they preside over is elevated as all participants in the process are inevitably impacted by those who oversee it.

The general aspiration for professionalism and civility is only a beginning. That aspiration raises important questions regarding the nature of the judge's role in a system in which conflict and tension are inevitable and in which the judge may be called upon to make difficult determinations involving guilt, individual responsibility, credibility, state of mind, and relative culpability.

The aspiration for professionalism and civility in the judiciary must be tempered by the occasional need for a judge to stand up to obstinacy or insubordination with sharpness and even severity. In some instances a party's behavior or position cannot appropriately be dealt with through docility and good cheer. At times it will be the proper role of a judge, as the voice of the law in the face of a party's blatant disregard of it, to come down harshly. In a criminal proceeding involving a convicted child sex abuser who refuses to acknowledge responsibility, for example, a judge may properly find it necessary to utter the unmistakably grave terms of chastisement—with a goal of awakening the defendant to the need to seek help and make fundamental changes. Alternatively, in a juvenile court matter in which an abusive or neglectful parent is the root source of an adolescent's legal problems, a judge may determine that the only path to a lasting resolution of the matter is to employ the terms and tone of austerity. And judges generally are called upon to make determinations of credibility; that core responsibility cannot be shunned because it might have a tendency to offend.

The aspiration for professionalism and civility must also leave room for a range of personalities and temperaments among our judges. The judicial function is performed by individual human beings with discretion to apply the law to new facts. Judges must be permitted to do so in a manner consistent with their individual temperament and personality. Our standards are not intended to prescribe a single orthodoxy of temperament or personality.

The standards below seek to balance these competing objectives. They establish some bright lines that should never be crossed, regardless of a judge's temperament or personality and even in the most difficult circumstances. And they distinguish appropriate exercises of sharpness or severity (those with a due purpose in law, in the rules of procedure, or in the judge's efforts to maintain order and decorum) from those that are merely gratuitous (lacking any proper basis, and employed out of personal spite or animosity).

These standards are aspirational. They are not intended to prescribe legal standards to be invoked in litigation or as a basis for sanctions or penalties to be imposed against judges (except insofar as they may merely reiterate standards prescribed elsewhere that establish an independent basis for sanctions).

Standards

(1) Judges will refrain from manifesting or acting upon racial, gender, or other improper bias or prejudice toward any participant in the legal process.

(2) Judges will not use language in oral or written communications, orders, or opinions that is vulgar or profane (except to the extent necessary to describe the facts or background of a case) or that gratuitously demeans or humiliates an attorney, litigant, witness, or another judge, recognizing, however, that judges are sometimes expected to stand up to obstinacy or insubordination with sharpness and even severity, and that the difficult legal or factual determinations they make might produce a demeaning or humiliating effect on a participant in the judicial process.

(3) Judges will not disparage the integrity, motives, intelligence, morals, ethics, or personal behavior of an attorney, litigant, witness, or another judge except in circumstances where such matters are in furtherance of a judge's responsibilities or are otherwise relevant under the governing law or rules of procedure. Judges will not impugn the integrity or professionalism of any lawyer on the basis of the client or cause which the lawyer represents.

(4) Judges will avoid impermissible ex parte communications.

(5) Judges will not adopt procedures aimed at delaying the resolution of proceedings before them or at compounding litigation expenses unnecessarily.

(6) Judges will endeavor to begin judicial proceedings on time and to provide reasonable notice if necessary to apprise the parties, recognizing that circumstances beyond the judge's control may impact the goal of punctuality.

(7) Judges will give issues in controversy thoughtful and impartial analysis and consideration, recognizing the corresponding prerogative and responsibility to promote their just, speedy, and inexpensive resolution.

(8) Judges will recognize that a party has a right to a fair and impartial hearing, and a right to present its cause within the limits established by law. Judges will allow lawyers or parties, within reasonable time limits, to present proper arguments and to make a complete and accurate record.

(9) In all legal proceedings, judges will direct parties, attorneys, and other participants to refrain from uncivil conduct. Judges who observe uncivil conduct or receive a reliable report of uncivil conduct will take corrective action as the judge deems appropriate.

(10) Judges will cooperate with other judges to ensure the successful management of the court as a system as well as the judge's individual docket.

Additional recommended reading:

http://www.ncsc.org/Publications-and-Library/Justice-System-Journal/Volume-28-Number-3.aspx

http://www.courts.ca.gov/partners/documents/Ethical_Issues_for_Judges_in_Handling_Cases_with.ppt.

http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Judicial_assistance.authcheckdam.pdf

Scenario re Conflict of Interest

Rule 1.7 provides in relevant part:
. . . A lawyer shall not represent a client if . . . There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or . . . by a personal interest of the lawyer.